

[Cite as *State v. Wolff*, 2009-Ohio-7085.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 07 MA 166
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	OPINION
	)	AND
JOHN E. WOLFF, Jr.,	)	JOURNAL ENTRY
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Application for Reopening,  
Criminal Appeal from Common Pleas  
Court, Case No. 06 CR 978.

JUDGMENT: Application Denied.

APPEARANCES:  
For Plaintiff-Appellee:

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Prosecuting Attorney  
Attorney Ralph M. Rivera  
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For Defendant-Appellant:

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JUDGES:  
Hon. Gene Donofrio  
Hon. Cheryl L. Waite  
Hon. Mary DeGenaro

Dated: December 31, 2009

PER CURIAM:

{¶1} Appellant John E. Wolff has filed an App.R. 26(B) application to reopen his appeal based on a claim of ineffective assistance of appellate counsel. However, we conclude that Wolff has failed to demonstrate a genuine issue as to whether he was deprived of the effective assistance of counsel on appeal. Accordingly, his application to reopen his appeal is denied.

{¶2} On August 21, 2007, Wolff was convicted of sixteen counts of rape and nine counts of gross sexual imposition, stemming from offenses committed against his two minor step-daughters, AB and SA. In his direct appeal, Wolff raised six assignments of error, addressing the sufficiency of the evidence regarding force and substantial impairment, the barring of evidence through the Rape Shield Statute, the prevention of cross-examination of the victims, the admission of hearsay statements, and prejudicial joinder of victims. On June 9, 2009, we affirmed the judgment of the trial court, finding five of Wolff's assignments of error to be meritless, and one assignment of error to have been mooted by the merger of two of Wolff's convictions. *State v. Wolff*, 7th Dist. No. 07 MA 166, 2009-Ohio-2897.

{¶3} Wolff has complied with the procedural requirements of App.R. 26(B) by timely filing the present application, attaching a sworn statement, and attaching copies of pertinent areas of the record for this court's review. Wolff has also attached many pieces of evidence dehors the record, which this court may not consider. After the State filed a response to Wolff's application, we granted Wolff leave to file a reply brief in response to the State.

### **Analysis**

{¶4} Pursuant to App.R. 26(B)(1), a criminal appellant may apply for a reopening of his appeal based on a claim of ineffective assistance of counsel. A defendant-appellant must identify "[o]ne or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate

counsel's deficient representation." App.R. 26(B)(2)(c). We must grant Wolff's application for reopening "if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5).

{¶5} The appellant "bears the burden of establishing that there was a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *State v. Spivey*, 84 Ohio St.3d 24, 25, 1998-Ohio-704, 701 N.E.2d 696. In order to determine whether an appellant has raised a genuine issue regarding appellate counsel's ineffectiveness, we apply the same standard for an analysis of trial counsel's ineffectiveness. *State v. Mack*, 101 Ohio St.3d 397, 2004-Ohio-1526, 805 N.E.2d 1108, at ¶4; *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. Thus, the appellant must establish that counsel's performance fell below an objective standard of reasonable representation by failing to raise the issues now presented, and that there was a reasonable probability that, but for appellate counsel's failures, the outcome of his original appeal would have been different. *State v. Were*, 120 Ohio St.3d 85, 2008-Ohio-5277, 896 N.E.2d 699, at ¶11. Appellate counsel need not have raised every possible issue in the original appeal in order for his assistance to have been constitutionally effective. *State v. Tenace*, 109 Ohio St.3d 451, 2006-Ohio-2987, 849 N.E.2d 1, at ¶7.

{¶6} It is with this standard of review in mind that we proceed to address Wolff's arguments in support of his application for reopening.

#### **Failure to Cite to the Record**

{¶7} As an initial argument, Wolff contends that his appellate attorney failed to comply with App.R. 12 and App.R. 16 in his briefing of the issues presented on appeal. It is true that this court chided appellate counsel for his failure to provide citations to the record and his failure to adequately present certain arguments. *Wolff* at ¶49, 73. However, this court also stated that it would exercise its discretion to address the issues despite the deficiencies in the attorney's brief. Wolff therefore did not suffer any prejudice from this particular deficiency. Wolff's argument does not satisfy the second prong of the *Strickland* test, and thus his argument is not well taken.

### **Improper Vouching for Victim-Witness Credibility**

{¶8} In his first proposed assignment of error, Wolff asserts: "The Trial Court plainly erred by permitting a medical expert witness and the prosecutor to testify as to the veracity of the accusers in violation of Evidentiary Rules and due process, thereby depriving him of a fair trial."

{¶9} Wolff contends that a medical expert witness, Janet Gorsuch, impermissibly attested to the veracity and credibility of victim SA, and that the prosecutor impermissibly vouched for the victims' credibility during closing statements.

{¶10} As for Wolff's argument regarding an expert witness vouching for the victims' credibility, Gorsuch stated during testimony that she accepts victims' statements as true when they divulge information to her. The record reflects that this discussion was initiated by Wolff's attorney during his cross-examination of Gorsuch. Because Wolff elicited the statements to which he now objects, he could not complain of any alleged error in Gorsuch's statements on appeal. Under the doctrine of invited error, a party cannot attempt to benefit from an error at trial that he invited. *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637, at ¶75; *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, at ¶86. Thus Wolff's argument on this point would be waived for the purposes of appeal.

{¶11} Wolff's argument regarding the prosecutor's statements indicates that he is raising an argument for prosecutorial misconduct. The prosecutor stated during closing arguments: "Is it reasonable that [SA] and [AB], what they told you is true? It sure is." Wolff did not object to this statement by the prosecutor, and thus would waive all but plain error on appeal. *State v. Hanna*, 95 Ohio St.3d 285, 2002-Ohio-2221, 767 N.E.2d 678, at ¶84.

{¶12} In reviewing a prosecutor's alleged misconduct, a court looks at whether the prosecutor's remarks were improper and, if so, whether the prosecutor's remarks affected substantial rights of the appellant. *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 14 OBR 317, 470 N.E.2d 883. An appellate court should not find reversible error unless, in the context of the entire proceedings, it appears that the misconduct deprived the appellant of

a fair trial. *State v. Fears*, 86 Ohio St.3d 329, 332, 1999-Ohio-111, 715 N.E.2d 136; *State v. Lott* (1990), 51 Ohio St.3d 160, 166, 555 N.E.2d 293. A conviction should be reversed due to improper statements in closing only if the jury would have found the defendant not guilty but for the improper statements. *State v. Benge*, 75 Ohio St.3d 136, 141-142, 1996-Ohio-227, 661 N.E.2d 1019.

{¶13} Parties have wide latitude in their closing statements, particularly "latitude as to what the evidence has shown and what inferences can be drawn from the evidence." *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, at ¶213. A prosecutor may state his opinion if it is based on the evidence presented at trial. *Id.* A prosecutor may not state his personal belief regarding the credibility of a witness. *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, at ¶117. However, a prosecutor may comment upon the testimony of witnesses and suggest the conclusions to be drawn. *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151, at ¶116. A prosecutor may even point out a lack of credibility of a witness, if the record supports such a claim. See *State v. Powell*, 177 Ohio App.3d 825, 2008-Ohio-4171, 896 N.E.2d 212, at ¶45.

{¶14} By stating that it would be reasonable to conclude that the victims were telling the truth, the prosecutor was more likely expressing his opinion on the overall believability of the evidence presented. The prosecutor's opinion was general and was within the scope of making an inference from the whole record. Given the generality of the prosecutor's statement, the statement was not improper, and thus did not constitute prosecutorial misconduct as a matter of plain error. Moreover, because this statement is the sole alleged instance of impropriety by the prosecutor, it would be considered "an isolated incident in an otherwise properly tried case." *State v. Lewis*, 7th Dist. No. 03 MA 36, 2005-Ohio-2699, at ¶40; *State v. Carter*, 89 Ohio St.3d 593, 603, 2000-Ohio-172, 734 N.E.2d 345. The isolated nature of the prosecutor's statement, in the context of the entire proceeding, could not have deprived Wolff of a fair trial.

{¶15} Given the foregoing, this court would have found Wolff's arguments to be meritless had they been raised on appeal. The outcome of Wolff's appeal therefore

would not have been different had appellate counsel raised this assignment of error. Wolff's first proposed assignment of error is meritless.

### **Sufficiency and Manifest Weight of the Evidence**

{¶16} In his second proposed assignment of error, Wolff asserts: "The jury verdicts are against the manifest weight of the evidence and are unsupported by sufficient evidence and the trial court erred in denying motions for acquittal and abused its discretion in denying the jury material exhibits it requested to decide the case causing the verdicts to be based on empty weight and insufficient evidence."

{¶17} In this proposed assignment of error, Wolff raises two arguments: that the verdicts were against the manifest weight of the evidence, and not supported by sufficient evidence.

{¶18} As for Wolff's sufficiency argument, the State claims that Wolff may not propose this assignment of error as it had already been raised in his original appeal. However, a defendant-appellant may raise arguments not previously presented for a particular assignment of error, even if the assignment of error was generally raised in the original appeal. App.R. 26(B). Here, Wolff has pointed out that appellate counsel only raised a sufficiency argument in regards to the elements of force and substantial impairment. In his proposed assignment of error, Wolff appears to have included an additional argument regarding insufficient proof of penetration. Wolff also contends that his conviction for Count Five was not supported by sufficient evidence, as Wolff did not have any contact with victim AB during the time period of the count due to the children's services safety plan in effect at that time.

{¶19} Wolff's convictions would only be reversed as based upon insufficient evidence if, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found that the elements of the crime were proven beyond a reasonable doubt. *State v. Goff*, 82 Ohio St.3d 123, 138, 1998-Ohio-369, 694 N.E.2d 916.

{¶20} As for Wolff's argument regarding the fifth count in his indictment, the portions of the record Wolff has cited indicate that Wolff had no contact with victim AB

from November of 2001 until February of 2002. However, the charge against Wolff in Count Five encompassed the entire time period from January to June of 2002. Testimony was presented at trial that Wolff did have contact with AB and engaged in sexual conduct with AB between February and June of 2002, thus the safety plan identified by Wolff did not cause his conviction for Count Five to be unsupported by sufficient evidence. Wolff's argument on this point would not have been successful had it been raised on appeal.

{¶21} As for Wolff's argument regarding sufficient proof of penetration, his convictions for rape, under R.C. 2907.02(A), required proof of sexual conduct. R.C. 2907.01(A) states that "'Sexual conduct' means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse."

{¶22} Wolff's sufficiency of the evidence argument regarding penetration fails because his own argument on this point includes citations to the record where the victims testified that penetration occurred. Although Wolff contends that the victim testimony lacked credibility, such a consideration is not applicable to an analysis of the sufficiency of the evidence. The record further indicates that witnesses testified to acts of penetration that supported each of Wolff's rape convictions. Thus Wolff's sufficiency of the evidence argument regarding penetration would not have been successful had it been raised on appeal.

{¶23} Wolff next proposes that his convictions were against the manifest weight of the evidence. When a court conducts a manifest-weight analysis, it weighs all of the evidence and reasonable inferences, considers the credibility of each witness, and determines whether the fact-finders clearly lost their way in resolving conflicts in the evidence to the point that they "created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

{¶24} The manifest-weight analysis is a broader inquiry into the original trial, but

only allows for a reversal in exceptional circumstances. *Thompkins* at 387. This is because the trier of fact was in the best position to determine the credibility of the witnesses and the weight due to the evidence. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 39 O.O.2d 366, 227 N.E.2d 212. Thus the reviewing court must determine whether the appellant or the appellee provided the more believable evidence, but must not completely substitute its judgment for that of the original trier of fact "unless it is patently apparent that the factfinder lost its way." *State v. Woullard*, 158 Ohio App.3d 31, 2004-Ohio-3395, 813 N.E.2d 964, at ¶81.

{¶25} Wolff presents many factors to support his manifest weight argument. To summarize, Wolff argues that none of the medical evidence supported the victims' allegations, that there were many inconsistencies in the victims' statements to different medical professionals in 2001 and 2006 and in their testimony at trial, and that defense witnesses testified that the victims were liars and further testified that they never observed any evidence of molestation. In his reply brief, Wolff further urges this court to consider the additional evidence attached to his application in our weighing of the evidence presented at trial. However, many of the attachments to Wolff's application are *dehors* the record and cannot be taken into consideration.

{¶26} As for the medical evidence argument, there is no requirement that testimonial evidence of sexual abuse must be corroborated by physical or other evidence. See *In re Hollobaugh*, 7th Dist. No. 08 MA 22, 2009-Ohio-797, at ¶21. Moreover, although there was no semen detected in the forensic analysis performed for the victims, other evidence did indicate anal or vaginal trauma which may or may not have been caused by Wolff.

{¶27} Upon our review of the record, there are certainly inconsistencies and victim-witness credibility issues that counsel could have raised in Wolff's direct appeal. However, we find that there was substantial evidence upon which the jury could have reasonably concluded that all the elements of the offenses were proven beyond a reasonable doubt. Further, this court cannot say that the jury clearly lost its way or created a manifest miscarriage of justice by returning guilty verdicts on the counts of rape and gross sexual imposition charged against Wolff.



{¶28} Given the foregoing, this court would not have found that Wolff's convictions were against the manifest weight of the evidence had appellate counsel raised the issue in Wolff's original appeal. The outcome of Wolff's appeal therefore would not have been different had appellate counsel raised this assignment of error.

{¶29} As an additional argument, Wolff contends in his reply brief that the trial court abused its discretion by refusing a juror's request to review the documents that were referenced at trial but not admitted into evidence. Wolff admits that his mention of this argument was not properly within the realm of a manifest weight analysis, and requests in his reply brief that we consider this argument separately.

{¶30} First, because Wolff failed to object to the refusal of the jury's request, he has waived all but plain error. Second, it is axiomatic that a jury may only consider evidence that has been admitted. See, e.g., R.C. 2945.35 ("No article or paper identified but not admitted in evidence shall be taken by the jury upon its retirement."). The jury was free to consider the testimony provided regarding exhibits that were not admitted. However, the jury could not review exhibits that were not admitted into evidence. The trial court therefore did not commit plain error when it refused the jury's request to view exhibits that were not admitted into evidence. Wolff's argument on this point is not well taken.

{¶31} Wolff's second proposed assignment of error is meritless.

#### **Ineffective Assistance of Trial Counsel**

{¶32} In his third proposed assignment of error, Wolff asserts: "The Appellant was deprived of his right to a fair trial due to ineffective assistance of trial counsel."

{¶33} Wolff presents four examples of trial counsel's deficiencies in support of his argument, and also argues that trial counsel's various mistakes cumulatively deprived Wolff of his right to constitutionally effective counsel.

{¶34} As with our review of appellate counsel's advocacy in this application to reopen, we review trial counsel's performance pursuant to the two-pronged test of *Strickland*, supra. To successfully argue ineffective assistance on a direct appeal, an appellant would have to establish that trial counsel's performance fell below an objective

standard of reasonable representation, and that the appellant was prejudiced by counsel's performance. *Strickland* at 687, 690.

{¶35} For his first argument, Wolff asserts that his trial counsel failed to adequately raise arguments related to the Rape Shield Statute. Specifically, Wolff contends that trial counsel was ineffective for failing to timely request a hearing pursuant to R.C. 2907.02(E) to determine if Wolff's proposed evidence regarding SA's prior sexual abuse could be admitted despite the Rape Shield Statute. Additionally, Wolff contends that trial counsel was ineffective for failing to raise the threshold question to SA regarding prior false accusations of sexual abuse, and for failing to ensure that his discussion of the matter was preserved in the record.

{¶36} The State counters that the Rape Shield Statute issues were waived for the purposes of appeal, and thus that appellate counsel could not have been ineffective for failing to address them. However, it is precisely because the issues were waived for appeal that an ineffective assistance of trial counsel claim could have been raised.

{¶37} As for prior instances of sexual abuse of SA, the record does not contain information that would allow this court to determine whether trial counsel's attempt to break through the Rape Shield Statute would have been successful if a pre-trial hearing had been timely requested and conducted. At no point in the record did trial counsel explain its reasons for proposing the evidence, or what the evidence would show. Although appellate counsel claimed that trial counsel wanted to introduce the evidence to prove an alternative source of knowledge about sexual activity or an alternative source of physical injury, this claim is unsupported by the record. Without evidence within the record, this court cannot determine whether trial counsel's conduct was deficient or whether Wolff was prejudiced by such deficiency.

{¶38} Moreover, the trial court explained in its decision overruling Wolff's motions for acquittal and new trial that Wolff was prohibited from introducing evidence of prior sexual abuse because he did not propose to introduce the evidence for any of the allowable purposes under R.C. 2907.02(D). Thus, even if Wolff had timely requested a hearing to propose the introduction of prior sexual abuse of SA, the trial court's statement indicates that it would not have allowed the introduction of the evidence. Regardless of

whether trial counsel's procedural problems constituted deficient performance, the trial court's response to the issue indicates that Wolff was not prejudiced by counsel's performance.

{¶39} As for SA's prior false accusations of sexual abuse, the record again does not contain information that would allow this court to determine whether trial counsel's attempt to introduce the evidence would have been successful had Wolff adequately raised the issue. Although trial counsel stated on the record that SA had previously made sexual abuse allegations against Clemente Alicea, Mark Bilchik, as well as her grandparents, there is no way to discern from the record whether trial counsel would have successfully proven that any or all of those allegations involved a complete absence of proof of sexual activity. Without such information, this court would be unable to conclude there was a reasonable probability that, but for the deficiency of trial counsel, the outcome of Wolff's trial would have been different.

{¶40} Determining whether the outcome of Wolff's trial was affected by counsel's Rape Shield Statute errors requires an examination of evidence which is dehors the record. Because of this, Wolff would still be able to raise this claim in a petition for postconviction relief, and would not be barred by res judicata. See *State v. Smith* (1985), 17 Ohio St.3d 98, 101, fn. 1, 17 OBR 219, 477 N.E.2d 1128. However, this argument would not have been successful had appellate counsel raised it on appeal. The outcome of Wolff's appeal therefore would not have been different had appellate counsel raised this assignment of error.

{¶41} For his second argument, Wolff asserts that trial counsel failed to object to statements by a medical expert witness and the prosecutor regarding the veracity of the victims' testimony. However, as explained in the discussion of Wolff's first proposed assignment of error, such statements were not improper, thus trial counsel was not deficient for failing to object.

{¶42} For his third argument, Wolff asserts that trial counsel erroneously concluded that the negative results from SA's 2001 rape kit and the testimony of the forensic analyst were inadmissible, due to an alleged break in the chain of custody of the rape kit.

{¶43} Pursuant to Evid.R. 901, an exhibit may not be admitted into evidence until it is properly authenticated "by evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A). Testimony by a witness with knowledge "that a matter is what it is claimed to be" is an acceptable method of authentication. Evid.R. 901(B)(1). Consequently, physical evidence may be admissible pursuant to such testimony even if there is not proof of a perfect chain of custody. *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, at ¶57; *State v. Wilkins* (1980), 64 Ohio St.2d 382, 389, 18 O.O.3d 528, 415 N.E.2d 303. A break in the chain of custody, or the possibility of contamination or degradation of the evidence goes to the weight of the evidence, not its admissibility. *Gross* at ¶57.

{¶44} Wolff argues that there was no break in the chain of custody of the rape kit as claimed by trial counsel, and that the evidence and testimony should have been presented to the jury regardless. However, the record indicates that there was a break in the chain of custody. Trial counsel for Wolff was unable to locate the medical professional who performed the rape kit examination on SA on November 7, 2001 at the Tod Children's Hospital. Counsel was unable to provide proof as to how the medical evidence was procured, how it was passed from the possession of the hospital to the police, how it was initially preserved, or how it was stored from 2001 to 2006. For the purposes of proffer, counsel did present the testimony of witnesses who were involved in the chain of custody of the rape kit in 2006, as well as the forensic analyst who found no evidence of semen or saliva after testing the kit contents on September 8, 2006.

{¶45} Although there was a substantial break in the chain of custody of the evidence, Wolff is correct in stating that such a break would not necessarily render the evidence inadmissible. However, trial counsel did not explicitly state his reasoning for only proffering the rape kit results before the trial court and not the jury. Given the extensive break in the chain of custody, the evidence from SA's rape kit may have carried little to no weight.

{¶46} Trial counsel's decision whether to call a witness or present particular evidence "falls within the rubric of trial strategy and will not be second-guessed by a

reviewing court." *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, at ¶222, quoting *State v. Treesh*, 90 Ohio St.3d 460, 490, 2001-Ohio-4, 739 N.E.2d 749. It is within the realm of reasonable representation to refrain from introducing evidence of potentially little probative value before the jury. Wolff's argument would therefore fail under the first prong of *Strickland*.

{¶47} For his fourth argument, Wolff asserts that trial counsel failed to challenge the inconsistencies and the credibility of the State's witnesses. However, Wolff did not explain how trial counsel failed to do so. During trial, counsel cross-examined the victims and other State witnesses in order to emphasize contradictions and inconsistencies in testimony and statements made prior to trial. There is not indication in the record that trial counsel was deficient for this reason.

{¶48} For his fifth argument, Wolff asserts that trial counsel's various errors cumulatively violated his right to the effective assistance of counsel. However, given the foregoing analysis, Wolff has not demonstrated multiple instances of deficient performance by trial counsel. This argument is not well taken.

{¶49} The outcome of Wolff's appeal would not have been different had appellate counsel raised this assignment of error. Wolff's third proposed assignment of error is also meritless.

{¶50} Accordingly, Wolff's arguments lack merit and his application to reopen his direct appeal is hereby denied.

Donofrio, J., concurs.

Waite, J., concurs.

DeGenaro, J., concurs.